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BEFORE THE
Federal Communications Commission

WASHINGTON, D.C. 20554

NOV 9 9 1995

In the Matter of)
)
Amendment to the Commission's Rules) WT Docket 95-157
Regarding a Plan for Sharing the) RM-8643
Costs of Microwave Relocation)

To: The Commission

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COMMENTS
OF
THE CITY OF SAN DIEGO, CALIFORNIA

Respectfully submitted,

The City of San Diego,
California

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EXECUTIVE SUMMARY

The City of San Diego, California, will be directly affected by the outcome of this proceeding. It is the licensee of 4 links in the 2 GHz band that must be relocated.

The City supports the Commission's proposal for cost sharing, since it will facilitate the relocation of its entire microwave system at one time by present PCS licensees. The early and complete relocation of the City's system will also benefit PCS licensees who are seeking prompt use of the City's frequencies. The Commission should emphasize that any cap on cost sharing is not a cap on incentives that can be negotiated during the voluntary negotiation period.

Rather than defining a good faith offer made during the mandatory negotiation period in terms of "comparable facilities," the Commission should define a good faith offer as one that would make the incumbent whole. The incumbent should be entitled not only to receive new equipment but also to recover all expenses that it would not have incurred but for the necessity to relinquish its microwave frequencies. Mandatory negotiations are still negotiations and it would not be fair to require the City to forego legal or consulting assistance (or pay these expenses itself) merely because the negotiations may take place during the mandatory phase of the relocation framework.

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COMMENTS
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THE CITY OF SAN DIEGO, CALIFORNIA

The City of San Diego, California, by its attorneys and pursuant to Section 1.415 of the Commission's rules, submits the following comments in the captioned proceeding.

The Interest of the City of San Diego

The City of San Diego is the licensee of four microwave "links^{1/}" to be relocated from the 2 GHz band. The microwave communication system carries important operational traffic relating to the City's public services, including vital public safety communications.

An analysis of the specific frequencies licensed to the City discloses that the system would be likely to suffer

^{1/} We use the term "link" to mean the communications circuit between two fixed points, created by two, reciprocal microwave transmit paths.

interference from PCS systems operating in all of the designated license blocks. Furthermore, the locations of the receive sites in the City's 2 GHz microwave system are such that it would be very difficult for the PCS companies to share the City's frequencies without causing harmful interference to the City's system. Therefore, the City believes that all of its 2 GHz facilities will have to be relocated by the PCS systems.

This proceeding focuses on a framework to allow PCS licensees to share the costs of relocating incumbent 2 GHz microwave licensees. This proceeding also seeks to modify the rules and policies that govern the relocation process during the mandatory negotiation phase. The City of San Diego will be directly affected by the results of this proceeding and, accordingly, the City is an interested party.

The City Supports Cost Sharing

The focal point of this proceeding is a proposed cost sharing mechanism which is necessary because the process of selecting PCS licensees in all of the spectrum blocks has not been completed and will not be completed for some time. There are many circumstances where the relocation of an

incumbent's microwave links by an early PCS licensee in, say, the A or B block, will benefit an as-yet-unselected PCS licensee in one of the other license blocks. Thus, present PCS licensees have requested the Commission to adopt a formula to apportion among future PCS licensees, in proportion to their benefit, some of the costs incurred by the present PCS licensees in relocating the incumbent microwave systems.

The City of San Diego supported this concept in its Comments to the rule making petition and the City continues to support this concept. As the Commission noted at paragraph 32 of its Notice of Proposed Rule Making ("NPRM"), a "major benefit" of such a mechanism is the facilitation of the relocation of "entire microwave systems" and a "seamless transition" from the 2 GHz band. The City wholeheartedly agrees.

The City of San Diego, like so many other operators of 2 GHz microwave systems, has determined that its system should be replaced in one, comprehensive step. In early relocation negotiations with PCS licensees, however, the City has encountered reluctance to relocate any links other than those that directly impact that particular PCS licensee's system.

Although these PCS licensees seem to desire access to the City's 2 GHz frequencies as soon as possible, they have regarded the City's request for full-system replacement as somehow excessive. Yet, from the standpoint of the City, the piecemeal approach is unduly repetitive and burdensome on its limited resources.

The Commission's rules provide that, even in an involuntary relocation^{2/}, the incumbent must be furnished comparable replacement facilities. Thus, in the face of such reluctance, it makes sense under the current rules for the City to await the selection of all PCS licensees and either negotiate with all parties simultaneously for a full-system replacement or await a total involuntary relocation.

The Commission's cost-sharing proposal would permit the City to accommodate the requests of the existing PCS licensees for early access to the City's frequencies. It would also permit the existing PCS licensees to accommodate the request of the City for a full-system replacement, by enabling them to eventually receive a substantial contribution from subsequent PCS licensees.

^{2/} See footnote 3, infra.

Cost Sharing Cap

The Commission has stated, at paragraph 42 of the NPRM, that the cost sharing cap is not an upper limit on permissible compensation to incumbents. The City can support the sharing cap so long as this point is clearly understood by all interested parties.

Voluntary Negotiations

The Commission has described the voluntary negotiation phase of the relocation process in paragraphs 6 and 68 of the NPRM. The Commission has reaffirmed that during the voluntary phase, the parties are free to negotiate any relocation terms and conditions that are mutually acceptable. This may include "offer[s of] premium payments or superior facilities as an incentive to the incumbent to relocate quickly." The City fully supports this approach since it provides the flexibility for many diverse parties, under a limitless variety of circumstances, to craft their own, unique agreements without artificial limits.

The City Has Concerns About Some Proposed Relocation Guidelines

Going beyond establishment of a cost-sharing mechanism, the Commission has also proposed to revise the relocation guidelines that apply only in the mandatory negotiation period and after the conclusion of the voluntary negotiation period.

Comparable Facilities

At the heart of the Commission's proposal for revisions in the mandatory negotiation framework is the discussion of "comparable facilities." While the Commission grapples with ways to objectively quantify a good faith offer in terms of comparable facilities, the City of San Diego submits this more simple and workable standard: an offer is a good faith offer if the incumbent would be made whole.

In reliance upon the stability of the federal regulatory and licensing regime, the City of San Diego and thousands of other entities procured and licensed 2 GHz microwave systems to meet their communication requirements. Now the City and the others must revisit decisions they made long ago, re-evaluate their communication requirements, re-engineer their systems, and replace their equipment. None

of this enormous effort would be necessary if it were not for the Commission's decision to use the 2 GHz band to support emerging technologies.

The process of relocation to replacement facilities is expensive. It requires incumbents like the City to divert internal resources to this task and, in many cases, to incur outside engineering fees, consulting fees, and legal fees, as well. In addition, there are coordination fees and FCC filing fees that apply, not to mention the cost of the replacement equipment, its installation and the removal of existing equipment. If it becomes necessary to obtain independent cost estimates of comparable equipment, there will be fees for that as well.

The Commission has made the fundamental decision that the incumbents should come out of this process at least as well off as they were before they were forced to undertake it. Such an outcome involves more than attempting to match the functionality of new equipment to old equipment. It must include all expenses, internal and external, that would not have been incurred by the incumbent but for the necessity to relocate its 2 GHz microwave system. Anything less amounts to incumbents' subsidizing the establishment of PCS networks.

In the NPRM, the Commission devotes considerable attention to the determination of the comparability of replacement equipment to existing equipment. The City of San Diego urges the Commission to focus on comparable functionality, not comparable value. The book value of an existing system is completely irrelevant to the primary objective of the relocation process, namely, to assure that the incumbent can continue to communicate at least as well as it did before.

In order to continue to be able to communicate as well in a new microwave band, the reality is that new equipment must be procured. It is probably safe to assume that the new equipment will cost more than the book value of the old equipment. Although the costs would not be comparable, the functionality would be the same. So the only valid inquiry is how best to measure that functionality.

To measure functionality, the Commission has proposed to examine communications throughput, system reliability and operating cost. The City of San Diego agrees that these parameters are reasonable measures of system functionality. However, in order to avoid penalizing licensees that had prudently anticipated growth in usage, the City urges the Commission to rule that the system's potential capability,

especially in terms of throughput, should be the replacement standard and not the actual throughput of the system at the time of the relocation.

Despite the Commission's efforts to define comparability, it is apparent to the City of San Diego that reasonable people may nevertheless differ as to whether comparable facilities have been offered. The City therefore supports a mechanism for determination of comparably functional facilities by a mutually-acceptable, independent third party, so long as the cost of that determination is also reimbursable. Incumbents who agree to such dispute resolution should be considered to be negotiating in good faith, even if they reject an offer that the PCS licensee says is an offer of comparable facilities.

Finally, the City of San Diego urges the Commission to clarify the language of paragraph 76 of the NPRM, which purports to deal with "the obligation to provide comparable facilities under *involuntary relocation*...." (Emphasis added.) In this paragraph, the Commission, among other things, states its view that fees for attorneys and consultants are extraneous and "not reimbursable after the voluntary negotiation period has concluded."

There has always been a fundamental distinction among the three phases of the relocation framework: the voluntary negotiation phase, the mandatory negotiation phase, and the involuntary relocation phase.^{3/} Paragraph 76 seems, however, to equate the last two phases.

Under an involuntary relocation scenario, where the incumbent does nothing but await the delivery of the keys to its new system from the emerging technology provider, it is understandable that the Commission would rule that attorneys' and consultants' fees are extraneous. But in a negotiation phase, especially if the negotiations are mandatory, it is unreasonable to rule out attorneys' and consultants' fees as unreimbursable.

Negotiations are often conducted by attorneys and/or consultants on behalf of incumbents who may not be skilled

^{3/} See, for example, the Third Report and Order and Memorandum Opinion and Order in ET Docket 92-9, 8 FCC Rcd 6589 (1993), at paragraph 15: there are two negotiating periods, a voluntary negotiation period and a mandatory negotiating period, that must expire before an emerging technology licensee may proceed to request involuntary relocation. The involuntary relocation process is spelled out in paragraph 5 of the same document and is embodied in Section 94.59(c) of the Commission's rules. In general, the involuntary relocation process requires the emerging technology licensee to replicate the microwave incumbent's facilities and pay all expenses of cutting over to the new facilities.

in that process. In the experience of the City of San Diego to date, the PCS incumbents have been represented by skilled negotiators. It is simply unfair to expect incumbents to forego such assistance or to absorb the costs themselves. It is especially unfair in view of the fact that the negotiations are mandatory. Again, these are expenses that the City would not incur, but for the need to implement the Commission's decision to reallocate the 2 GHz microwave frequencies. Therefore these costs should be reimbursable, at least in the voluntary and mandatory negotiation phases of the process.

Public Safety Certification

If "the majority of the communications carried [on the incumbent's 2 GHz microwave system] are used for police, fire, or emergency medical services operations involving safety of life and property," then, under existing rule section 94.59(f), the voluntary and mandatory negotiation periods are each a year longer.

The Commission has proposed to require incumbents claiming public safety status to (1) establish their eligibility in the Police, Fire, Emergency Medical or Special Emergency radio services; (2) prove they are a

licensee in one of these services; and (3) demonstrate to the satisfaction of the PCS licensee that the majority of the communications relate to these functions.

Without indicating that there has been a problem in this area, the Commission has nevertheless proposed the above solution. The City of San Diego submits that the Commission's proposal is unworkable. It puts the ultimate determination in the hands of a party that is inherently biased against finding that a system carries a majority of public safety traffic.

Moreover, the Commission offers no objective, quantitative measure for making a satisfactory public safety demonstration. The Commission's proposal leaves completely open the possibility that the incumbent will claim to have made a satisfactory demonstration and the PCS licensee, in whose hands the ultimate decision would seem to rest, will nevertheless disagree.

The Commission has already seen the difficulties created by requiring "comparable facilities" without an objective measure thereof. It should not create a similarly difficult situation. The Commission accepts "self certification" in other contexts. A written exertion of the

claim of public safety status, supported by a self certification, is the most that the Commission should require here.

Twelve Month Trial Period

In paragraphs 83 through 85 of the NPRM, the Commission discusses its view that an incumbent would be able to surrender its license as part of a relocation agreement without prejudicing its right to be relocated back to the 2 GHz band if the facilities proved within 12 months not to be comparable to the incumbent's former facilities. The City of San Diego urges the Commission not to couch any new rules in terms of "surrendering licenses."

Microwave licenses issued by the Commission often contain several paths in several different bands. As part of a relocation agreement, the incumbent may agree to delete from its license(s) the paths that comprise the link(s) in question, but it would not be appropriate to surrender the license totally unless the links in question were the only links shown on the license.

Conclusion

The City of San Diego greatly appreciates the Commission's steadfast adherence to rules and policies that shelter microwave incumbents from disruption of their vital communication networks as well as from expenses that they would not incur but for the reallocation of these microwave frequencies. The City views the Commission's cost sharing proposal as a positive development. Regarding other Commission proposals in this proceeding, the City has pointed out certain aspects which are unfair or unworkable. The City urges the Commission to take these to heart and make the suggested revisions in order to continue to maintain fair treatment of microwave incumbents.